IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 19,431

QUEEN INSURANCE CO. OF AMERICA and GLENS FALLS INSURANCE CO.,

Appellants,

vs.

UNITED STATES NATIONAL BANK OF SAN DIEGO, etc.,

Appellees.

No. 19,432

QUEEN INSURANCE CO. OF AMERICA and GLENS FALLS INSURANCE CO.,

Appellants,

vs.

LONG BEACH NATIONAL BANK,

Appellee.

No. 19,433

QUEEN INSURANCE CO. OF AMERICA and GLENS FALLS INSURANCE CO.,

Appellants,

vs.

UNITED STATES NATIONAL BANK OF SAN DIEGO, etc.,

Appellee.

PETITION FOR REHEARING.

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Pursuant to Rule 23, Ninth Circuit Rules, the appellants herein respectfully petition for a rehearing of the within causes. The grounds of this petition are:

1. The decision herein was based upon a ground—interpretation of the contracts in suit in the light of

business custom and usage—that has never been raised, briefed or argued and in respect of which appellants have had neither notice nor opportunity to be heard. The causes, therefore, have been decided by a procedure that was unfair to appellants and which (especially when taken in conjunction with the drastic restrictions of rule 23 upon the extent and scope of a petition for rehearing) has denied them due process of law contrary to the Fifth Amendment to the Constitution of the United States.

2. If in the circumstances of these causes evidence of custom and usage was cognizable, the Court's use and application of that evidence is erroneous for these reasons, all grounded in the law of California:

(a) As an aid to interpretation, evidence of custom and usage is no different from any other extrinsic evidence; and, therefore, a prerequisite to its admissibility and consideration for that purpose is an ambiguous or uncertain contract. It follows that even on the theory of decision adopted by this Court, it should have decided (which it did not squarely do) the strongly mooted issue of ambiguity to which the parties and the lower court devoted most of their proof, argument and consideration.

(b) The effect of the decision is to add to the contracts an agreement to insure a predecessor's fidelity losses. If the contracts, read apart from the alleged custom, do not provide such insurance, evidence of custom and usage, whatever may be its availability as an aid to interpretation, is ineffective to make such an agreement for the parties, or to vary or alter the agreement they did make. The Court, therefore, should have decided whether the contracts as written covered such losses, in order to determine, among other things, whether

evidence of custom and usage was properly cognizable.

(c) If the contracts as written exclude coverage of a predecessor's fidelity losses, the effect of the decision is not to determine what the parties meant by what they said, but rather to determine, contrary to the rule the Court professed to be following, that they meant something other than what they said.

(d) In order for extrinsic evidence to be effective to aid in the determination of what the parties meant by what they said there must be language in the contract capable of bearing the meaning sought to be given it. The Court seriously doubted there was any such language. Without such language there is no agreement. Agreement, as distinguished from meaning of ambiguous or obscure language, cannot be supplied by custom.

(e) The evidence relied upon did not establish the existence of the assumed custom as a fact, but only the opinions of a few persons as to the legal meaning and effect of policy forms. That is not sufficient to establish the existence in fact of a custom and usage of such general and universal acceptance in the business as to bind contracting parties.

(f) The evidence principally relied upon—Fitzgerald's opinions—was not evidence of a custom in existence at the time the contracts were entered into, but only of his opinion at a time long after they had been entered into and after these cases had been commenced.

(g) That part of the evidence thought by the Court to show the custom relied upon—*i.e.*, the evidence of the Association drafting activities—is only part of the evidence. The effect given it as

showing that predecessor losses were covered is negated by the drafting done after the contracts had been executed, so as to provide express coverage of such losses. This was a clear recognition that the pre-existing custom did not include them.

3. The evidence upon which the Court relies was inadmissible and objected to on substantial grounds other than the parol evidence rule—*e.g.*, hearsay, lack of foundation to show authority, invasion of the court's province to determine questions of law. Whatever the purpose for which it is used, evidence to which an appropriate objection has been made may be considered only if it is competent evidence. The Court should have determined the issue of competency that was squarely raised by appellants' objections below and specifications of error here.

4. The decision as to custom and usage is inconsistent with decisions of the Supreme Court of the United States and of this Court (as well as with the California decisions) to the effect that proof of a custom or usage inconsistent with a contract and which contradicts it cannot be received in evidence to affect it.

5. The statutory rules of interpretation in California, have been the subject of nearly a century of judicial exposition. They have received, as a consequence, a gloss that is not always the same as the literal meaning of the statutory language. Generally, and in respect of the rules with which this Court seems to have been most impressed, resort to "surrounding circumstances," "practical construction," "custom and usage" and the like may only be had to explain ambiguous, uncertain or obscure language, not to vary or contradict the meaning and legal effect of the contractual language, or to make for the parties an agreement they did not make.

6. The California decisions upon which the Court relied, are distinguishable, as they involve factual settings materially different from the instant cases, such as, *e.g.*: (a) evidence that a specific word or phrase by trade usage had acquired a meaning different from its ordinary meaning—no such word or phrase or evidence is identified at bar; (b) the contract was ambiguous in respect of the very provision that was being interpreted and upon which resolution of the controversy between the parties depended—no such provision is identified at bar; (c) existence of a trade usage, adhered to by a party to show the reasonableness of his conduct; or to show inferentially that certain conduct, conforming to the usage would have been taken.

Respectfully submitted,

HOWARD I. FRIEDMAN,
HERMAN F. SELVIN,
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Certificate.

I hereby certify that I am of counsel for the appellants herein; that in my judgment this petition is well founded; and that it is not interposed for delay.

HERMAN F. SELVIN